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No. 90-318

Supreme Court, U.S.  
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In the  
**Supreme Court of the United States**

October Term, 1990

CARL W. TINNON, LOLA TINNON, BITUMINOUS  
FIRE & MARINE INSURANCE COMPANY AND  
DELTA INCORPORATED OF ARKANSAS  
Petitioners

v.

BURLINGTON NORTHERN RAILROAD COMPANY  
Respondent

Reply to Brief in Opposition

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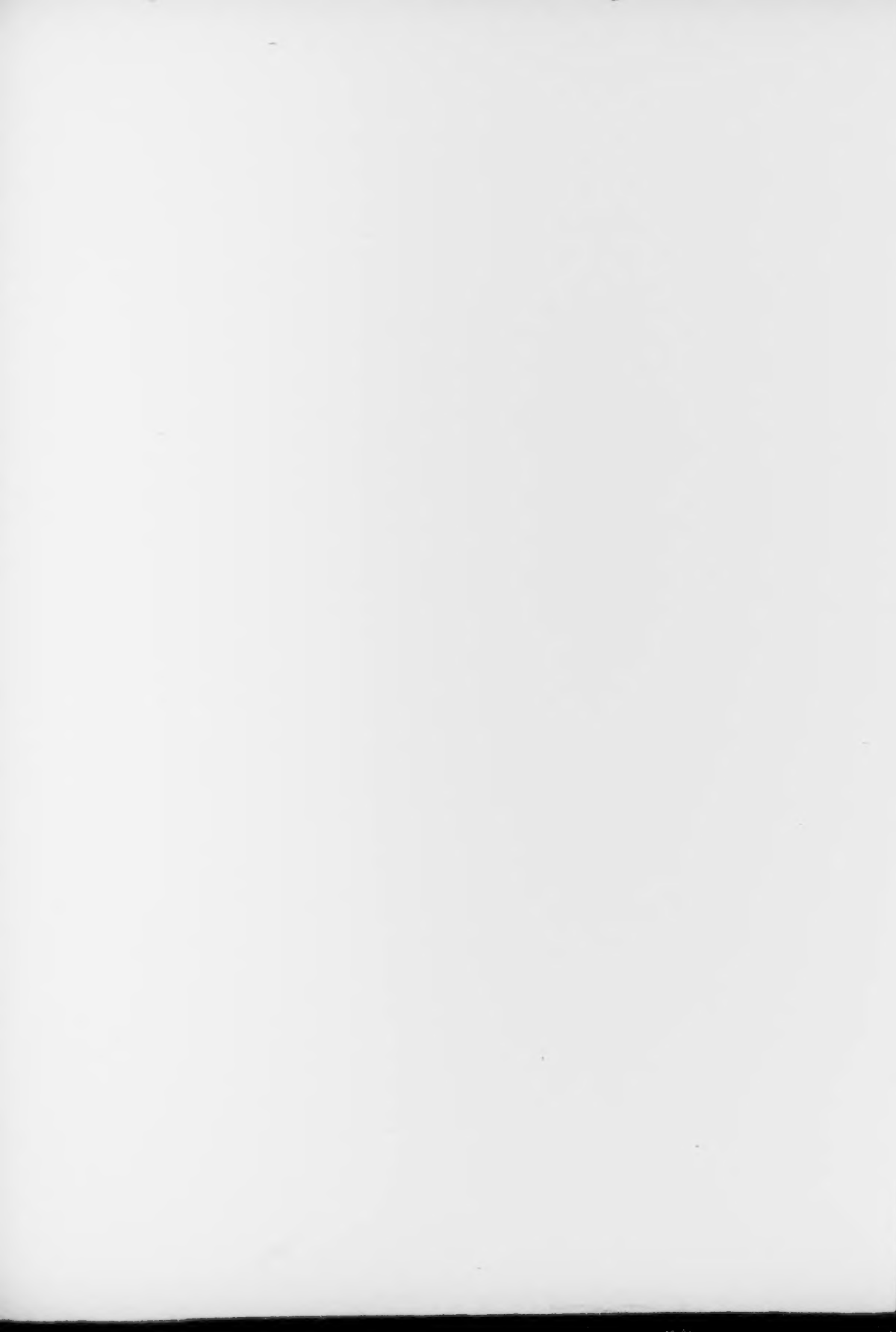
Attorney for Petitioners (Intervenors below)

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**REPLY TO BRIEF IN OPPOSITION**

Respondents argue the petitioners' petition "never mentions Rule 17" (sic) of the Rules of the Supreme Court of the United States, and "petitioners do not base their petition upon any of the reasons for review enumerated in Rule 17 (sic) because none exist". Such argument is without merit.

Rule 10 of the Rules of the Supreme Court of the United States sets forth considerations governing review on writ of certiorari. The considerations are expressly stated to be "neither controlling nor fully measuring the Court's discretion". Petitioners' petition did in fact address a number of the enumerated non-exclusive considerations.

Petitioners will not attempt to repeat the arguments made in its petition addressing such considerations, as such would be redundant. Petitioners did point out in their petition the case was of general and public importance in view of the strong public interest in maintaining public confidence in the fairness of our courts and system of justice. p. 11. Petitioners also invoked the power of supervision of this Court in view of the construction and application of F.R.Civ.P. Rule 51 to reward surprise and work injustice. p. 11. One of the considerations enumerated in Rule 10 involves the need for exercise of this Court's power to supervision when a Court of Appeals has sanctioned a departure by a lower court from the accepted and usual course of judicial proceedings. Petitioners assert such occurred in this case for the reasons enumerated in their petition. pp. 11-17, 23.

Further, petitioners' petition asserts the Eighth Circuit Court of Appeals in this case construed F.R.Civ.P. Rule 51 in a manner conflicting with the admonition of F.R.Civ.P. Rule 1 and the import of decisions of this Court pp. 11-17, 23. Another consideration for review under Rule 10 is when a Court of Appeals has decided a federal question in a way conflicting with applicable decisions of this Court.

In addition, petitioners' petition points out the conflict between the Eighth Circuit's view of the plain error standard and those of other circuits, and the need to promote uniformity of decisions among the Courts of Appeals in such regard (pp. 20-23), which is another consideration for review under Rule 10.

Respondent's brief also criticizes petitioners' statement of the case as a "one-sided review of the way in which they perceive the facts and proceedings of the District Court . . ." However, respondent did not point out any inaccuracy in petitioner's statement of the case. Had any inaccuracy existed, respondent surely would have pointed it out to this Court in view of the clear requirement

of Rule 15 of the Rules of the Supreme Court of the United States for a respondent to point out any misstatements in its brief in opposition. The respondent's own response to petitioners' motion for new trial in the District Court conceded respondent's failure to provide petitioners with a copy of the offending instruction. App. 47-48.

*National Labor Relations Board v. Pittsburg Steamship Co.*, 340 U.S. 498, 503 71 S.Ct. 451, 95 L.Ed. 479 (1951) is not authority for the proposition for which it is cited in respondent's brief. It is a National Labor Relations Act case in which state law was not at issue.

Although the propriety of getting the jury instruction in question does involve an issue of state law, this Court can exercise its power of review to consider the matter, particularly when it involves plain error, or when the construction of state law by the lower Court is unreasonable. *Francis v. Southern Pacific Co.*, 33 U.S. 445, 447, 68 S.Ct. 611, 92 L.Ed. 798 (1948), *Propper v. Clark*, 337 U.S. 472, 69 S.Ct. 1333, 93 L.Ed. 1480 (1948), rehearing denied 338 U.S. 841, 70 S.Ct. 33, 94 L.Ed. 514 (1949). Here, the instruction in question did constitute plain error under the evidence at trial, since a crucial fact question was effectively taken from the jury. It should be noted that the District Court did not hold the instruction was correct or that the jury was properly instructed. App. 7-9.

## CONCLUSION

Petitioners respectfully request their petition for writ of certiorari be granted for the reasons indicated therein.

Respectfully submitted,

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